No. 22,67

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TANNER MOTOR LIVERY, LTD.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF OF RESPONDENT TANNER MOTOR LIVERY, LTD.

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BRIEF OF RESPONDENT TANNER MOTOR LIVERY, LTD.

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of the Board's order issued against Respondeent on June 30, 1967 (166 NLRB No. 135). On June 29, 1965, this Court rendered its decision (349 F. 2d 1) remanding the Board's order in the original proceeding, issued on September 29, 1964 (148 NLRB 1402). The Court has jurisdiction under Sections 10(e) and 10(f) of the Act.

STATEMENT OF THE CASE

The Board found that Martin Abramson, a taxicab driver employed by respondent at its Santa Monica branch, approached Respondent's branch manager, Frank Barrial, on July 23, 1967, regarding the possibility of Respondent's hiring as a taxicab driver one Elbert Kellough, a Negro with previous experience as a driver. Barrial informed Abramson that he had no objections to hiring a Negro and that he had on file the application of a Negro whom he intended to hire at the first opportunity, but that there were presently no openings. Barrial interviewed Kellough the following day, and gave him an application which subsequently was filed. (R. 13; Tr. 7, 94, 95.)

On July 24, 1967, Abramson and Sanford Dorbin separately conferred with Barrial about Respondent's hiring policies, specifically with regard to the hiring of negroes. (R. 13-14; Tr. 17-19, 64-66.) At all times material hereto, Respondent's taxicab drivers had an exclusive bargaining representative, Chauffeur's Union, Local 640, an affiliate of the Teamsters. Neither the record herein nor the Board's findings discloses that either Abramson or Dorbin at any time contacted the union regarding the hiring of negroes by Respondent, the racial composition of Respondent's driver force, or any other matter.

Subsequently, on July 24 and 25, 1967, Abramson was involved in two accidents which caused damage to his taxicab. He was advised on August 29, 1967 of his discharge because of the accidents. (R. 14; Tr. 33-34.)

On August 1, 1967, Abramson, with representatives of civil rights groups, began picketing Respondent's premises. Dorbin joined the picket line on August 6. He was discharged but immediately reinstated with the advice that a mistake had been made. (R. 16; Tr. 103.)

The Board determined in its initial decision that Abramson and Dorbin had engaged in a concerted activity to persuade Respondent to hire additional negroes, and that they were discharged for engaging in that activity. The Board further held the said activity was protected under Section 7 of the Act, and therefore that the discharge of these employees was a violation of Section 8(a)(1) of the Act. The Board also held that Dorbin had been threatened with discharge in an independent violation of Section 8(a)(1) of the Act. Respondent was ordered to reinstate Abramson with payment of backpay and to post appropriate notice.

This Court, in its prior decision herein, held that if Abramson and Dorbin had not been represented by a collective bargaining agent their activities would be protected under Section 7 of the Act. However the Court stated in its opinion that because of the provisions of Section 9(a) of the Act such protection did not necessarily apply when there is an established collective bargaining representative having a contract with the employer and the employees do not act or seek to act through that representative. The Court remanded this case to the Board for further consideration of the question whether the employee activity

here involved was protected in view of the application of Section 9(a).

The Board, one member dissenting, reaffirmed its previous decision that Respondent interfered with the exercise of the employees' rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act. The Board disposed of the question put by this Court for which the case was remanded, by stating that a finding that Abramson's and Dorbin's activities were unprotected because of the collective bargaining agreement between the Union and Respondent "would be offensive to public policy". No authority was cited in the Board's opinion for this conclusion.

ISSUE TO BE DETERMINED

Are the activities of Abramson and Dorbin here involved protected activities within the meaning of Section 7 of the Act, in view of the fact that the employees did not act or seek to act through the exclusive collective bargaining representative as required by Section 9(a) of the Act?

ARGUMENT

I. RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT.

A. Introduction.

The Board in its opinion on remand did not consider either of two critical questions of fact presented in this proceedings. The first such question is whether

Abramson and Dorbin attempted to act through their exclusive bargaining representative, Local 640, before presenting their demand directly to the employer. The record herein, and the Board's findings below, indicate that the Union was bypassed completely. Second, the Board ignored the question whether the employees were attempting to bargain or whether instead they were presenting a grievance under Section 9(a) of the Act. The Board's opinion summarily disposes of both questions with the following statement:

> "The record does not establish whether Abramson and Dorbin had attempted to act through their established bargaining representative before addressing their concerted protest directly to their Employer. In our opinion, however, such a finding is not essential herein. Nor do we find it necessary, as suggested by the Court, to determine whether the employees were filing a grievance under the proviso to Section 9(a), or whether they were attempting to bargain individually with their Employer. For, in either event, the employees were not acting in derogation of their established bargaining agent by seeking to eliminate what they deemed to be a morally unconscionable, if not an unlawful, condition of employment."

The Board then deals with the question to which it was directed by this Court to apply its administrative expertise, by conclusively assuming that Abramson and Dorbin were acting in accord with and in furtherance of the lawful position of their collective bargaining agent. The opinion goes on to state:

> "For the Board to find, therefore, that the employees' otherwise protected concerted activities herein were rendered unprotected by virtue of an existing collective-bargaining agreement between the Union and the Respondent would be offensive to public policy."

No authority whatsoever is cited for this proposition.

B. Section 9(a) of the Act Renders Unprotected the Activity of Abramson and Dorbin Because It Constituted an Attempt to Bargain Which Bypassed the Exclusive Bargaining Representative.

The clear mandate of Section 9(a) of the Act is that employees must bargain through the collective bargaining representative if such exists.[1] The limited exception provided is with respect to personal grievances, which an employee may present directly, so long as the adjustment is not inconsistent with the collective bargaining agreement *and* the bargaining representative has been given an opportunity to be present at such adjustment. The purpose of the statute in so explicitly limiting private bargaining by employees was stated by the Supreme Court in *Medo*

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[1] "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, *shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment*: Provided, That any individual employee or group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." (Emphasis supplied.)

Photo Supply Corp. v. NLRB, 321 U.S. 678, in which the Court held that Section 9(a) placed on the employer the duty to bargain only with the representative and not with individual groups of employees. The opinion states:

> "That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co. v. Labor Board,* 321 U.S. 332. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found."

See also *Virginian Railway Co. v. System Federation,* 300 U.S. 515, in which the Supreme Court also held that the Act "imposes the affirmative duty to treat only with the representative and hence the negative duty to treat with no other."

The instant case is to be distinguished from such cases as *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, where the employees had no bargaining agent. The long established and exclusive representative of Tanner's taxicab drivers was Local 640 of the Chauf-

feur's Union; also a collective bargaining agreement was in effect, and under it an established grievance procedure was available.

The Courts of Appeal have consistently upheld the exclusive representation principle set forth in Section 9(a). In *NLRB v. Draper Corp.* (CA 4th) 45 F. 2d 199, the court held that the firing of 41 employees who engaged in a "wildcat" strike did not constitute a violation of Section 8(a)(1) of the Act. The opinion states:

> "Even though the majority of the employees in an industry may have selected their bargaining agent and the agent may have been recognized by the employer, there can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer. The whole purpose of the act is to give to the employees as a whole, through action of a majority, the right to bargain with the employer with respect to such matters as wages, hours and conditions of work."

See also *McQuay-Norris Manufactuing Co. v. NLRB* (C.A. 7th) 116 F. 2d 748; *Texarkana Bus Co. v. NLRB* (C.A. 8th) 119 F. 2d 480; *North Electric Manufacturing Co. v. NLRB* (C.A. 6th) 123 F. 2d 887.

The contention of the Board in response to the mandate of Section 9(a) is that "if there was an identity of goals between the Union and these protesting employees, the fact that the Union did not trigger the protest . . . would not render the employees'

conduct unprotected." Petitioner's brief, page 9. The next step in the argument is that since the bargaining representative was obliged to oppose racial discrimination, such identity of goals between the individual employees and the Union must have existed.

Several critical fallacies are present in this position, which we believe to be novel. First, Section 9(a) does not by its plain terms protect the exclusive bargaining power of the representative only in those situations in which the representative's goals are in conflict with those of individual employees or groups of employees who might seek to deal directly with the employer. The Act provides that the selected representative shall be the *exclusive representative of all the employees in the unit* for the purpose of bargaining in respect to conditions of employment. The purpose of this provision, as this Court observed in its previous opinion in this case, is "to encourage the practice and procedure of collective bargaining." The Court goes on to state:

> ". . . To that end the Act sets up an elaborate procedure whereby a collective bargaining representative of employees can be identified and designated and then gives to such a representative a preferred status in dealing with the employer in relation to terms and conditions of employment."

Thus it is manifest that Section 9(a) establishes a *procedure* for orderly collective bargaining, which neither the employer nor the employees may disregard. *Medo Photo Supply Corp., supra.* The applicability of this procedure does not depend upon

whether the goals of individual employees or groups of employees are identical to those of the Union, nor whether such goals are worthy. To sustain the Board's argument would be to place upon employers an intolerable burden of determining on a case by case basis whether it might safely bargain directly with individual employees, or whether doing so would constitute an unfair bargaining practice. Of course the effect of such a holding upon the status of the unions could be devastating.[2]

In the case at bar, the record does not disclose whether Local 640 supported the objectives of Abramson and Dorbin that Respondent hire additional negroes and vary the racial composition of its force of taxicab drivers. If we assume, as has the Board, that the Union must have shared these goals, the statutory requirement that the employees proceed through their bargaining representative is even more cogent. They had nothing to lose and a great deal to gain in seeking the assistance of Local 640.

None of the cases cited by the Board in its brief herein supports its argument that individual employees are permitted to bargain directly with the employer, bypassing the representative, in regard to racial hiring and policies. In *NLRB v. R. C. Can Company* (C. A. 5th) 328 F. 2d 974, a "quickie strike" by a substantial number of employees was held to be a protected activity because it was in support of objectives the union was then actively attempting

[2]The AFL-CIO filed with the Board a brief as *amicus curiae* in the proceedings on remand.

to implement. Obviously the employee activity could not there undercut collective bargaining procedures, nor was the employer there required to choose between the Union and the individual employees. The same analysis applies to the similar situations in *Western Contracting Corporation v. NLRB* (C. A. 10th) 322 F. 2d 893, and *Hamilton v. NLRB* (C. A. 6th) 160 F. 2d 465, cert. den. 332 U. S. 762.

The Board's asumption that the position herein of the employees and Local 640 must have been identical does not, even if it is correct, pertain to the issue before the Court. Section 9(a) provides a *procedure for orderly collective bargaining. Medo Photo Supply Corp., supra.* Ignoring this procedure could only undercut the Union and its policies and programs designed to effect the hiring of Negroes. Permitting individual employees freely to bypass bargaining representatives in such a matter could obviously wreak havoc with the status of Unions at least among their minority group members, and might well militate against the ultimate attainment of civil rights objectives.

The Board seems to argue that Respondent was obliged to advise Abramson and Dorbin that they should proceed through the Union—also that the employer should have apprised the Union of the employees' complaint. No authority is cited for this novel contention. Obviously the employer cannot be responsible for conducting communication between the employees and their bargaining representative. In any case the exclusive bargaining power of the union

under Section 9(a) cannot be diminished by any such omission of the employer.

C. Abramson's and Dorbin's Activity Was Not the Presenting of a Grievance Within the Meaning of Section 9(a) of the Act.

The only circumstance in which Section 9(a) of the Act permits individual employees or a group of employees to bypass the collective bargaining representative is with respect to the presenting of personal grievances. The necessity of limiting this exception was very well pointed out by this Court in its earlier decision in the instant case:

> "If 'grievances' is held to cover any complaint or request of the employees relating to terms and conditions of employment, there may develop a sort of continuous 'collective-bargaining,' under the guise of presenting grievances, that could be inimicable to the effective operation of the collective-bargaining contract. If employees who thus present 'grievances' to their employer may also resort to a picket line when they think that the employer has not properly responded to their demands, the purposes of the Act might well be defeated. There appears to be a difference between collective bargaining and presenting grievances, else why did the Congress limit the proviso in section 9(a) to grievances? Thus the desire of employees for non-discriminatory hiring, while a proper subject for collective bargaining, may not be a proper basis for a grievance." *Tanner,* 5.

The Courts and the Board have consistently taken a restrictive view of the application of the proviso of Section 9(a) regarding grievances. In *Hughes Tool*

Co. v. National Labor Relations Board (C.C.A. 5th) 147 F. 2d 69, the Court analyzed the distinction between collective bargaining in respect to conditions of employment, and dealing with an employer regarding grievances. The opinion defines grievances as "usually the claims of individuals or small groups that their rights under the collective bargain have not been respected." The opinion further states:

> "These claims may involve no question of the meaning and scope of the bargain, *but only some question of fact or conduct peculiar to the employee, not affecting the unit." Hughes,* 70. (Emphasis added.)

Another Court of Appeals has defined "grievances" as involving "secondary disputes" in contrast to disputes over working conditions. *West Texas Utilities Co. v. National Labor Relations Board* (C.A.D. of C.) 206 F.2d 442. The Board has held that wage inconsistencies involving individual employees are a proper subject for grievances. *B. F. Goodrich Co.,* 89 NLRB 1151.

Respondent contends that the racial composition of the employer's working force is manifestly in the nature of a working condition, and a matter for collective bargaining. This view is supported by the decision of the Supreme Court in *New Negro Alliance v. Sanitary Grocery Co.* 303 U.S. 552, which held that the picketing of a grocery store by a group of negroes for the purpose of enforcing a request that the store employ negroes, was an activity protected from injunction by the Norris-LaGuardia Act, 29 U.S.C., Chapter 6. The Court stated:

> "The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. . ." *New Negro Alliance,* 561.

The Norris-LaGuardia Act applies to labor disputes including "any controversy concerning the terms or condition of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." Section 13(c). See also *Steele v. Louisville & Nashville R.R. Co.* 323 U.S. 192; *Moore v. Illinois Central R. Co.* (C.C.A. 5th) 112 Fed. 959.

As the Court noted in its earlier opinion, many important collective bargaining agreements now contain provisions against discrimination by reason of race. *Tanner,* 4. Also, the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000e-2(a), categorizes racial discrimination as a condition of employment. Section 703(a)(1) of the Act provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

The only reasonable interpretation of Section 9(a) of the National Labor Relations Act is that the racial composition of the employer's working force qualifies as a working condition within the meaning of the provision, and is a proper subject for the operation of the collective bargaining machinery. Bypassing the exclusive representative in such a matter could not only, as this court has recognized, be inimicable to the collective bargaining contract; it might also be inimicable to employees' civil rights by excluding the agency and the procedures with far greater capacity to secure a remedy than the efforts of individual employees.

Even if Abramson's and Dorbin's complaint were the proper subject for a grievance, Section 9(a) requires that the bargaining representative must have been given the opportunity to be present at the adjustment. The record does not indicate that Local 640 was given such opportunity, or that it was even notified of the demand.

In conclusion, Respondent respectfully urges that this Court not here interpret the Act, we believe for the first time, in such a manner that the hiring of negroes is removed from collective bargaining, and made the subject of sporadic tinkering by individuals such as that here indulged in by Abramson and Dorbin.

II. THE CASE SHOULD BE REMANDED FOR DISPOSITION CONSISTENT WITH THE BOARD'S DECISION IN CASES PRESENTLY PENDING BEFORE THE BOARD WHICH WILL DETERMINE WHETHER AND TO WHAT EXTENT SUCCESSOR EMPLOYERS ARE OBLIGATED TO REMEDY THE UNFAIR LABOR PRACTICES ALLEGED AGAINST THE RESPONDENT.

Respondent herein is one of the employers involved in three cases now before the National Labor Relations Board, and presently pending decision by the Trial Examiner. These cases are Nos. 31-CA-40 (formerly 21-CA-6448), 31-CA-339, and 31-CA-479 (formerly 21-CA-7254), which have been consolidated for hearing. On August 9, 1967 the Board issued an order reopening the record and remanding the proceedings to the Regional Director for Region 31 for the purpose of arranging a further hearing before the Trial Examiner to determine whether, and if so to what extent and on what basis certain individuals doing business as Pacific Coast Transportation Company ("Pacific"), and West Coast Transportation Co., ("West Coast") are obligated to remedy the unfair labor practices alleged against Respondent herein, Tanner Motor Livery, Ltd.

The said Pacific acquired Respondent's taxicab service (the employer of Abramson and Dorbin) on or about July 19, 1965, and West Coast subsequently succeeded to the business. Respondent is no longer engaged in the taxicab business.

On June 11, 1968, the Trial Examiner issued his Supplemental Decision in Case No. 31-CA-40 in which it was held that Tanner ceased to be employer, within the meaning of Section 2(2) of the Act, of the em-

ployees of Tanner's taxicab business (which included Abramson and Dorbin) on October 5, 1965. The Supplemental Decision holds that Pacific succeeded Tanner as employer on October 5, 1965, and that West Coast succeeded as employer on December 31, 1965.

Tanner filed exceptions to the Examiner's Supplemental Decision, contending that it was succeeded by Pacific on July 19, 1965, the date specified by the parties for the transfer of the taxicab business.

Case No. 31-CA-40 has now been transferred to the Board and is pending decision, as are the related cases Nos. 31-CA-339 and 31-CA-479, in which the Trial Examiner issued his decision on June 25, 1968.

Since the unfair labor practices alleged against Respondent in the instant proceedings also involved employees of the taxicab service, and occurred prior to Respondent's sale of the business on or about July 19, 1965, the determination of the Board in Case No. 31-CA-40 and the related cases whether Pacific and West Coast are obligated to remedy the alleged unfair labor practices of Respondent is directly relevant to the order here presented for enforcement.

This objection was not urged before the Board because the order of the Board reopening the record and remanding the related cases for consideration of the question of the obligations of the successor entities for Respondent's alleged unfair labor practices had not been issued until August 9, 1967, well after completion of the Board's proceedings on remand in the instant case. The Board issued its Supplemental Decision and Order herein on June 30, 1967. Respond-

ent contends that there exist extraordinary circumstances within the meaning of Section 10(e) of the National Labor Relations Act.

Respondent respectfully submits that if the Court finds that Respondent violated the Act, the Board's request for enforcement should be denied and the case should be remanded in order that Pacific and West Coast be joined as respondents, and the case be disposed of consistent with the Board's decisions in Cases Nos. 31-CA-40, 31-CA-339 and 31-CA-479.

CONCLUSION

For the reasons stated, it is respectfully requested that a decree enforcing the Board's Order in full, or in part, be denied.

Dated, San Francisco, California,
January 15, 1969.

Respectfully submitted,
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